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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CALIFORNIA EDUCATION COMMITTEE, LLC and PRISCILLA SCHREIBER, Plaintiffs, v. ARNOLD SCHWARZENEGGER, in his official capacity as Governor of the State of California; EDMUND G. BROWN, JR., in his official capacity as Attorney General of the State of California; JACK O'CONNELL in his official capacity as California Superintendent of Public Instruction; and DOES 1 through 20 inclusive, Defendants.	Case No.: 07-CV-02246-BTM-WMC Judge: Hon. Barry Ted Moskowitz **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF EQUALITY CALIFORNIA AND GAY-STRAIGHT ALLIANCE NETWORK TO INTERVENE AS PARTY DEFENDANTS**

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TABLE OF CONTENTS

Page

I INTRODUCTION 1

II FACTUAL BACKGROUND 1

- A. The Relief Sought By Plaintiffs. 1
- B. The Interests Of Proposed Intervenors 2
- C. The Challenged Statutes. 4
  - 1. Challenged hate crime provisions. 4
  - 2. Challenged Education Code provisions, as amended by SB 777. 6
    - a. Education Code sections 210.7, 212.6 and 220 as amended by SB 777. 7
    - b. Education Code 51500 as amended by SB 777. 8
- D. Position Of Other Parties 9

III ARGUMENT 9

- A. Equality California And The GSA Network Are Entitled To Intervene As Of Right Under FRCP 24(a). 10
  - 1. Equality California and the GSA Network's motion is timely. 11
  - 2. Equality California and the GSA Network have significant interests in the subject matter of the action. 11
  - 3. Disposition of this action will significantly impair or impede the interests of Equality California and the GSA Network. 14
  - 4. The interests of Equality California and the GSA Network may not be adequately represented by the parties to the action. 16
- B. In The Alternative, The Court Should, In Its Discretion, Permit Equality California And The GSA Network To Intervene Under FRCP 24(b). 19

IV CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Cases

California ex rel. Lockyer v. United States, 450 F.3d 436 (9th Cir. 2006) ____ 11, 13, 15, 16, 17, 19, 23

California Teachers Assn. v. Hayes (1992) 5 Cal. App. 4th 1513 ____ 18

California v. Tahoe Regional Planning Agency, 792 F.2d 775 (9th Cir. 1986) ____ 16, 18

Campaign for California Families v. Newsom, California Appellate Court Case No. A110652 ____ 22

Campaign for California Families v. Schwarzenegger AS07035 ____ 23

Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967) ____ 11

City of Los Angeles, 288 F.3d 391 (quoting *Donnelly v. Glickman*, 159 F.3d 405 (9th Cir.1998) ____ 12

Cumero v. Public Employment Relations Bd. (1989) 49 Cal. 3d 575 ____ 18

Don't Waste Washington Legal Defense Found. v. Washington, 461 U.S. 913 (1983) ____ 12

Forest Conservation Council v. United States Forest Service, 66 F.3d 1489 (9th Cir. 1995) ____ 10, 11, 14, 16, 17

Hayes v. Commission on State Mandates (1992) 11 Cal. App. 4th 1564 ____ 18

Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392 (9th Cir. 1995) ____ 12, 14, 15

Idaho v. Freeman, 625 F.2d 886 (9th Cir. 1980) ____ 12

In re M.S., 10 Cal.4th 698, 896 P.2d 1365 (1995) ____ 5

In Re Marriage Cases, California Supreme Court Case No. S147999 ____ 22

Kirchmann v. Lake Elsinore Unified School Dist., 83 Cal.App.4th 1098 (2000) ____ 17, 18

Knight v. Schwarzenegger, Sacramento Superior Court Case No. AS05284 ____ 23

Knight v. Superior Court, 128 Cal.App.4th 14, Cal.Rptr.3d 687 (Cal.App. 3rd Dist., 2005) ____ 23

Laidlaw Waste Systems, Inc. v. Bay Cities Services, Inc. (1996) 43 Cal. App. 4th 630, ____ 18

LG Electronics Inc. v. Q-Lity Computer Inc., 211 F.R.D. 360 (N.D.Cal. 2002) ____ 20

Natural Resources Defense Council, Inc. v. U.S. Nuclear Regulatory Comm'n, 578 F.2d 1341 (10th Cir. 1978) ____ 14

Ngoun v. Wolf, U.S. District Court for the Central District of California Case No. SACV-05-868 23

Northwest Forest Res. Council v. Glickman, 82 F.3d 825 (9th Cir. 1996) ____ 11, 16

Nuesse v. Camp, 385 F.2d 694 (D.C. Cir. 1967) ____ 15

Paramo v. Kern Union High School District, Kern County Superior Court Case No. S-1500-CV-255519 ____ 23

Prete v. *Bradbury*, 38 F.3d 949 (9th Cir. 2006) ____ 19

Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco, California Appellate Court Case No. A110651 ____ 22

Rule 24(a) ____ 15

Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983) ____ 12, 14, 15, 16, 21, 22

San Jose Mercury News, Inc. v. U. S. Dist. Court, 187 F.3d 1096 (9th Cir. 1999) ____ 20

Sanguine, Ltd. v. United States Dep't of Interior, 736 F.2d 1416 (10th Cir. 1984) ____ 19

Spangler v. Pasadena City Bd. of Educ., 552 F.2d 1326 (9th Cir.1977) ____ 20, 21

Stadin v. Union Electric Co., 309 F.2d 912 (8th Cir. 1962) ____ 19

Trbovich v. United Mine Workers, 404 U.S. 528, n. 10, 92 S. Ct. 630, 30 L. Ed. 2d 686 (1972) _ 16, 17

Tyler v. State of California, California Appellate Court Case No. A110450 ____ 22

United States v. Alisal Water Corp., 370 F.3d 915 (9th Cir. 2004) ____ 11

United States v. City of Los Angeles, 288 F.3d 391 (9th Cir. 2002) ____ 10, 11, 14, 16, 19

United States v. Stringfellow, 783 F.2d 821 (9th Cir. 1986) ____ 19

Washington State Bldg. & Constr. Trades Council v. Spellman, 684 F.2d 627 (9th Cir. 1982) ____ 12

Statutes

1984 California Statute, ch. 1437, § 1 ____ 5

1987 Cal. Stat., ch. 1277, § 4 (current version at Cal. Penal Code section 422.6 (West 2007) ____ 5

1991 California Statutes, ch. 1184, § 1.5 ____ 5

1998 Cal. Stat., ch. 933, § 3 (former Cal.Penal Code § 422.76 (West 2004), current version at Cal. Penal Code § 422.56 (c) (West 2007)) ____ 6

1999 Cal. Stat., ch. 592, § 3.7 ____ 5

2004 Cal. Stat., ch. 700, § 6 ____ 5

2005 Cal. Stat., ch. 420, § 5 ____ 5

California Education Code section 212 ____ 2

California Penal Code section 420.6 ____ 2

California Penal Code section 422.55 (a)(2) ____ 2

California Penal Code section 422.55(b) ____ 2, 4

California Penal Code section 422.56 ____ 2, 3, 4, 5, 8, 13, 22

California Penal Code section 422.56(c) ____ 2, 4, 5, 6

California Penal Code section 422.6 ____ 2, 4, 7, 8

California Penal Code section 422.6(a), ____ 2, 4

California Statute 1991, ch. 607, § 5 ____ 5

Civil Code section 51 ____ 5

Civil Code section 51.7(b) ____ 5

Education Code section 200 ____ 23

Education Code section 201 ____ 23

Education Code section 41001 ____ 18

Education Code section 41002 ____ 18

Government Code section 11135(e) ____ 6

Government Code section 12926(p) ____ 6

Government Code section 12926(q), ____ 5

Hawaii Revised Statute section 489-2 ____ 6

Hawaii Revised Statute section 489-3 ____ 6

Hawaii Revised Statute section 515-3 ____ 6

Hawaii Revised Statute section 846-51 ____ 6

Health & Safety Code section 1365.5(e) ____ 6

Iowa Code Annotated section 216.2(9A) ____ 6

Iowa Code Annotated sections 216.6-216.10 ____ 6

New Jersey Statute section 10:5-4 ____ 6

New Jersey Statute section 10:5-5(rr) ____ 6

New Mexico Statutes Annotated 1978, section 28-1-2(Q) ____ 6

New Mexico Statutes Annotated 1978, section 28-1-7 ____ 6

Penal Code section 422.55 ____ 1, 2, 3, 4

Penal Code section 422.55(a) ____ 5

Rhode Island General Law 34-37-4 ____ 6

Rhode Island General Laws section 28-5-6 (10) ____ 6

Rhode Island General Laws section 34-37-3 (17 ____ 6

Washington Revised Code section 49.60.030 ____ 6

Washington Revised Code section 49.60.040(15) ____ 6

Other Authorities

Assembly Bill 1009 ____ 5

California Assembly Bill 537 ____ 3, 4, 7, 13, 22

[Former] Civil Rights Act, Civil Code Section 51.7 ____ 5

Senate Bill 1234 ____ 5

Senate Bill 98 ____ 5

Rules

Federal Rules of Civil Procedure Rule 24(a) ____ 10, 11, 12, 15, 19

Federal Rules of Civil Procedure Rule 24(b) ____ 1, 19, 20, 21

Federal Rules of Civil Procedure Rule 24(b)(1) ____ 20

Federal Rules of Civil Procedure Rule 24(b)(3) ____ 20

Treatises

6 Moore's Federal Practice § 24.10 [2][b] (Matthew Bender, 3d. ed.) ____ 20

Constitutional Provisions

California Constitution, Article 1, Section 1 ____ 2

United States Constitution
1st Amendment ____ 2

United States Constitution
Fourteenth Amendment ____ 2

MEMORANDUM OF POINTS AND AUTHORITIES

I INTRODUCTION

Equality California and the Gay Straight Alliance Network ("GSA Network") (collectively, "Proposed Intervenors") respectfully request that this Court permit them to intervene as party defendants in this lawsuit pursuant to Rule 24(a) and, in the alternative, Rule 24(b) of the Federal Rules of Civil Procedure. In this litigation, filed on November 27, 2007, it is Proposed Intervenors' understanding that Plaintiffs seek to enjoin the defendant officials of the State of California from implementing the sexual orientation and gender provisions of California's hate crime statute, codified at California Penal Code section 422.55 et seq, and the sexual orientation and gender provisions of California Senate Bill 777 ("SB 777"), also known as the Student Civil Rights Act, which was signed into law on October 12, 2007, and which will go into effect on January 1, 2008.[1] SB 777 clarifies and reinforces existing protections currently in the California Education Code, including California's prohibition of discrimination and harassment based on sexual orientation and gender.

A ruling invalidating the challenged provisions of the hate crime statute and of SB 777 would deprive members of Equality California and the GSA Network of important legal protections and would significantly impede Equality California and the GSA Network's efforts to protect their members and others from invidious discrimination and hate violence on the basis of sexual orientation and gender. As such, Equality California and the GSA Network have direct and substantial interests in the outcome of this litigation and should be permitted to intervene in the action.

II FACTUAL BACKGROUND

A. The Relief Sought By Plaintiffs.

Plaintiffs California Education Committee, LLC and Priscilla Schreiber have brought suit against officials of the State of California, challenging the sexual orientation and gender provisions of California's hate crime statute and the sexual orientation and gender provisions of SB 777 on various federal and state constitutional grounds. The Complaint's Prayer for Relief seeks (1) preliminary and permanent injunctions enjoining the State of California and its officials from enforcing California Education Code § 220 as amended by SB 777; California Education Code § 210.7 as added by Senate Bill 777; California Education Code § 212.6 as added by SB 777; California Education Code § 51500 as amended by SB 777; California Penal Code §§ 422.6(a), 422.55 (a)(2) and (6), 422.55(b) and 422.56(c);[2] and the removal of California Education Code § 212; (2) a declaratory judgment that the same California Education Code and Penal Code provisions violate the First and Fourteenth Amendments to the United States Constitution; (3) a declaratory judgment that that the same California Education Code and Penal Code provisions violate the protections of privacy and safety in the California Constitution, Article 1, Section 1; and (4) costs and attorneys' fees. *See* Complaint at 10-11.

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[1] See SB 777, available at http://leginfo.ca.gov/pub/07-08/bill/sen/sb_0751-0800/sb_777_bill_20071012_chaptered.html.

B. The Interests Of Proposed Intervenors.

Equality California is California's leading lesbian, gay, bisexual, and transgender ("LGBT") civil rights organization, with tens of thousands of members throughout the state including many youth members who will directly benefit from SB 777. (Declaration of Geoffrey Kors, filed concurrently herewith, ("Kors Decl.") at ¶¶ 2 & 3.) Equality California's purposes include combating discrimination, harassment, and hate violence on the basis of sexual orientation and gender identity and protecting the needs and interests of LGBT people in the State of California, including LGBT students, teachers and others in publicly-funded California schools. (*Id.* ¶ 2.) Equality California was the official sponsor of SB 777 and the lead organization lobbying for the bill's passage. (*Id.* ¶ 5.) Equality California was also an official co-sponsor of, and the leading organization lobbying for, the measure that became California Assembly Bill 537, the California Student Safety and Violence Prevention Act of 2000 ("AB 537"), which banned discrimination in public schools on the same bases covered in the prohibition against hate crimes in California Penal Code Section 422.55, including actual or perceived sexual orientation and actual or perceived gender (including gender identity). (*Id.* ¶ 6; Cal. Penal. Code §§ 422.55, 422.56.) Since the passage of AB 537, Equality California and its members have assumed a continuing role in educating students, parents, teachers, and administrators throughout California about the requirements of AB 537 to protect students, including Equality California members, from discrimination based on sexual orientation and gender identity. (Kors Decl. ¶¶ 4, 10-12.)

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[2] Plaintiffs' Complaint states that Plaintiffs are challenging Penal Code sections 420.6, 420.55 and 420.56. *See, e.g.*, Complaint at ¶ 29. As such code sections do not exist, proposed Defendant-Intervenors assume Plaintiffs meant to reference Penal Code sections 422.6, 422.55 and 422.56.

The GSA Network is a youth-driven public interest organization made up of lesbian, gay, bisexual, transgender and heterosexual students and supportive adults who are dedicated to eliminating harassment, discrimination, and intolerance in California schools. (Declaration of Carolyn Laub, filed concurrently herewith, ("Laub Decl.") at ¶ 2.) The GSA Network's purposes include combating discrimination on the bases of sexual orientation and gender identity in schools by empowering lesbian, gay, bisexual, transgender and heterosexual student members to form and maintain local, school-based, student-run clubs, called "gay-straight alliances" or "GSAs," in high schools throughout California. (*Id.* ¶¶ 3 & 4.) At present, 654 GSAs in California are registered with GSA Network. The GSA Network has approximately 10,000 student members and 1,000 adult supporting members, including teachers, school administrators, and school counselors. (*Id.* ¶¶ 2 & 6.) The GSA Network helps its members work with school administrators and legislators to enact and implement policies that prevent harassment, discrimination, and violence against LGBT youth. (*Id.* ¶ 7.) Since 1998, the GSA Network has worked with students throughout California to organize and advocate for the passage of statewide legislation and had a significant role in the passage of AB 537 and SB 777. (*Id.* ¶¶ 2, 7 & 9.)

The membership of both Equality California and the GSA Network include LGBT students whom the sexual orientation and gender identity provisions of SB 777 and the hate crime statutes were designed to protect. (Kors Decl. 3; Laub Decl. 4) Equality

California's members also include parents of LGBT students who have interests in their children receiving an education free from discriminatory bias and in their children being protected against hate crimes based on sexual orientation and gender identity. (Kors Decl. 3, 15.) In addition, Equality California's members include LGBT parents who have children who are students in publicly-funded California schools who have an interest in their children receiving an education free from discriminatory bias based on sexual orientation and gender, as well as their children being protected against hate crimes based on their association with their LGBT parents. (Kors Decl. 3, 15.) GSA Network's members also include approximately 1,000 adult supporters, including teachers, school administrators, and school counselors who have an interest in eliminating the hostile environment that exists for many students because of their sexual orientation or gender identity and of protecting students against hate crimes based on their sexual orientation or gender identity. (Laub Decl. 2, 18.) Many adult members of GSA Network, including teachers, administrators, and counselors have almost 7 years of experience applying AB 537 and California's definition of gender in Section 422.56 of the California Penal Code in the state's schools. (Laub Decl. 2, 18.)

C. The Challenged Statutes.

1. Challenged hate crime provisions.

Plaintiffs seek to invalidate provisions of the California hate crime statute that prohibit willful violence and threats of violence based on sexual orientation and gender, which includes gender identity. Specifically, Plaintiffs challenge Penal Code[3] section 422.55(a)(2) & (6) (listing "gender" and "sexual orientation," respectively, as protected categories); Penal Code section 422.55(b) ("'Hate crime' includes, but is not limited to, a violation of Section 422.6"); Penal Code section 422.56(c) (defining "gender"); and Penal Code section 422.6(a), which prohibits acts or threats of violence that "willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of this state or by the Constitution or laws of

[3] Except as expressly noted otherwise, references to Codes in the text and footnotes shall be to California Codes.

the United States in whole or in part because of one or more of the actual or perceived characteristics of the victim listed in subdivision (a) of Section 422.55."

The California hate crime statute has prohibited violence and threats of violence based on sexual orientation since 1988, and has prohibited violence and threats of violence based on "gender" since 1992. 1987 Cal. Stat., ch. 1277, § 4 (current version at Cal. Penal Code § 422.6 (West 2007); S.B. 98, Cal. Stat. 1991, ch. 607, § 5; A.B. 1009, 1991Cal. Stat., ch. 1184, § 1.5,. In 1995, the California Supreme Court provided authoritative construction of many of the statute's terms in a case involving violence and threats of violence based on sexual orientation. *See In re M.S.*, 10 Cal.4th 698, 896 P.2d 1365 (1995).

The Penal Code defines "sexual orientation" to mean "heterosexuality, homosexuality, or bisexuality." Cal. Penal Code § 422.56 (h) (West 2007). The Legislature added this specific definition to the Penal Code effective 2005. S.B. 1234, 2004 Cal. Stat., ch. 700, § 6. This definition is identical to the definition of sexual orientation established in the former Ralph Civil Rights Act, in former Civil Code section 51.7(b), which went into effect in 1985.[4] 1984 Cal. Stat., ch. 1437, § 1. It is also identical to the definition of sexual orientation in the Fair Employment and Housing Act, Government Code section 12926(q), which has been in effect since 1999. 1999 Cal. Stat., ch. 592, § 3.7.

The Penal Code also defines the term "gender," providing that:

> "Gender" means sex, and includes a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.

Cal. Penal Code § 422.56(c). This wording has been in effect since 2005. A similar definition of "gender" had previously been in effect since 1999.[5] The current definition of gender in

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[4] In 2005, the definition was moved to another section of the Unruh Civil Rights Act, Civil Code section 51 in 2005. 2005 Cal. Stat., ch. 420, § 5.

[5] The hate crime's statute's definition of "gender" in effect from 1999 through 2004 provided that: "[G]ender" means the victim's actual sex or the defendant's perception of the victim's sex, and includes the defendant's perception of the victim's identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally

Penal Code § 422.56(c) is also incorporated by reference in the Fair Employment and Housing Act, Government Code section 12926(p); Health & Safety Code section 1365.5(e); and Government Code section 11135(e).[6]

2. Challenged Education Code provisions, as amended by SB 777.[7]

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associated with the victim's sex at birth." 1998 Cal. Stat., ch. 933, § 3 (former Cal.Penal Code § 422.76 (West 2004), current version at Cal. Penal Code § 422.56 (c) (West 2007)).

[6] A number of other states have adopted definitions of "gender" or "gender identity" similar to the statutory definitions in place in California. *See, e.g.*, Hawaii Revised Statutes §§ 489-2, 489-3, 515-3, H.R.S. 846-51 (prohibiting discrimination in real property transactions and public accommodations based on "a person's actual or perceived gender, as well as a person's gender identity, gender-related self-image, gender-related appearance, or gender-related expression, regardless of whether that gender-related expression is different from that traditionally associated with the person's sex at birth"); Rhode Island Gen. Laws §§ 28-5-6 (10), 34-37-3 (17)), 34-37-4 (prohibiting discrimination in employment and housing based on "'Gender identity or expression' [which] includes a person's actual or perceived gender, as well as a person's gender identity, gender-related self image, gender-related appearance, or gender-related expression; whether or not that gender identity, gender-related self image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person's sex at birth."); New Mexico Statutes Annotated 1978, §§ 28-1-2(Q), 28-1-7 (banning discrimination in employment, housing and public accommodations based on "a person's self-perception, or perception of that person by another, of the person's identity as a male or female based upon the person's appearance, behavior or physical characteristics that are in accord with or opposed to the person's physical anatomy, chromosomal sex or sex at birth"); Iowa Code Ann. §§ 216.2(9A), 216.6-216.10 (prohibiting discrimination in employment, public accommodations, housing, education and credit based on the "gender-related identity of a person, regardless of the person's assigned sex at birth"); New Jersey Statutes §§ 10:5-4, 10:5-5(rr) (barring discrimination employment, public accommodations, housing and other real property based on gender identity or expression, which is defined to mean "having or being perceived as having a gender related identity or expression whether or not stereotypically associated with a person's assigned sex at birth"); Washington Revised Code §§ 49.60.030, 49.60.040(15) (barring discrimination in employment, credit and insurance transactions, places of public resort, accommodation, or amusement, and real property transactions based on gender expression or identity, which is defined as "having or being perceived as having a gender identity, self-image, appearance, behavior or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the sex assigned to that person at birth").

[7] Proposed Intervenors' discussion of SB 777 in this Memorandum focuses only on those provisions of SB 777 expressly challenged by Plaintiffs. Proposed Intervenors do not here provide a comprehensive account of all of the statutory amendments made by SB 777.

As explained in more detail below, the Education Code has for years incorporated by reference the unlawful grounds for discrimination enumerated in the Penal Code without uniformly repeating all of those grounds in the Education Code provisions themselves. In addition, various Education Code provisions contained different lists of prohibited grounds for discrimination or used different terms for such prohibited grounds. The overarching purpose of SB 777, as described by the Senate Judiciary Committee Analysis, was "to amend [the Education Code] so that the list of prohibited discrimination is consistent throughout the Education Code, and with the cross referenced sections of the Penal Code." Senate Judiciary Com. Analysis of Senate Bill No. 777 (2007-2008 Reg. Sess., pp. 1-2 (April 18, 2007)).

a. Education Code sections 210.7, 212.6 and 220 as amended by SB 777.

Plaintiffs are seeking to invalidate protections against discrimination based on sexual orientation and gender in Education Code section 220, which prohibits discrimination "in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid." Cal. Ed. Code § 220. Plaintiffs also challenge the definitions of sexual orientation and gender in Education Code section 210.7 and SB 777's removal of Education Code section 212.6, which previously defined the term "sex."

Section 220 has prohibited discrimination in publicly funded educational programs and activities based on sexual orientation and gender identity since 2000 as a result of a 1999 amendment of Section 220 to prohibit discrimination on "any basis that is contained in the prohibition of hate crimes set forth in subdivision (a) of Section 422.6 of the Penal Code," as well as on the bases previously enumerated in Section 220.[8] A.B. 537, 1999-2000 Reg. Sess.

For example, in addition to the provisions described below, SB 777 made a number of other changes to various Education Code provisions, including, *inter alia,* replacing references to "handicapped" individuals in the Education Code with references to persons "with disabilities" and defining certain statutory terms, such as "disability" and "nationality."

[8] Education Code sections 200 and 220 originally prohibited discrimination based on sex. 1982 Cal. Stat., ch. 1117, § 1, pp. 4037-4038 (current version at Cal. Ed. Code § 200 (West 2007)). In 1998, the Legislature amended these sections to prohibit discrimination

(Cal. 1999), §§ 2-3. The effect of the 1999 amendment was to expand the list of protected characteristics in Education Code section 220 to include sexual orientation and gender (including perceptions of gender identity), which already were among the categories protected by the hate crime statute. *See* Section C.1., *supra.*

SB 777 revised Education Code section 220 to include sexual orientation and gender (including gender identity) in the list of characteristics expressly enumerated in the statute, rather than simply incorporating them by reference to Penal Code section 422.6.[9]

SB 777 also added to the Education Code definitions of the terms "sexual orientation" and "gender" that are identical to the Penal Code definitions that the Education Code previously incorporated by reference. Specifically, SB 777 enacted Education Code section 212.6, which, like Penal Code section 422.56(h), states: "'Sexual orientation' means heterosexuality, homosexuality, or bisexuality." S.B. 777, 2007-2008 Reg. Sess. (Cal. 2007), § 9. In addition, SB 777 enacted Education Code section 210.7, which, like Penal Code section 422.56(h), states: "'Gender' means sex, and includes a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth." S.B. 777, 2007-2008 Reg. Sess. (Cal. 2007), § 4. The definition of "gender" in Education Code section 210.7 (and in the Penal Code provision cross-referenced in the Education Code), incorporates "sex" within the meaning of "gender" by stating, in part, that "'[g]ender' means sex." In conjunction with the addition of Education Code section 210.7, SB 777 eliminated Education Code section 212's definition of the term "sex" as "the biological condition or quality of being a male or female human being."

b. Education Code Section 51500 as amended by SB 777.

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based on "ethnic group identification, race, national origin, religion, color, or mental or physical disability," as well A.B. 499, 1997-1998 Reg. Sess. (Cal. 1998), §§ 7, 16.

[9] SB 777 also amended sections 219, 200, 66251, 66269, and 66270 to include sexual orientation and gender (including gender identity) in the list of expressly enumerated characteristics in those provisions rather than cross-referencing Penal Code section 422.6. Those provisions are not at issue in this lawsuit.

SB 777 amended Education Code section 51500 to change the sentence "No teacher shall give instruction nor shall a school district sponsor any activity which reflects adversely upon persons because of their race, sex, color, creed, handicap, national origin, or ancestry" to the following: "No teacher shall give instruction nor shall a school district sponsor any activity that promotes a discriminatory bias because of a characteristic listed in Section 220." SB 777, 2007-2008 Reg. Sess. (Cal. 2007), § 29 (amending Cal. Ed. Code § 51500). This alteration made two changes in the existing statutory language. First, SB 777 replaced "reflects adversely upon" with "promotes a discriminatory bias." Second, SB 777 revised the list of prohibited bases of discrimination in section 51500 to refer instead to the protected characteristics in section 220, as amended by SB 777. The latter change had the effect of adding "sexual orientation" and "gender" to the list of prohibited bases of discrimination addressed by section 51500, although that section previously covered "sex" and Section 220 already prohibited discrimination based on sexual orientation and gender (including gender identity) in publicly funded educational programs and activities.[10]

D. Position Of Other Parties

Counsel for Defendants in the Office of the Attorney General has informed counsel for Proposed Intervenors that Defendants do not oppose intervention by Equality California and GSA Network as party defendants. As of the filing of this Motion, Proposed Intervenors do not know whether Plaintiffs plan to oppose the Motion.

III ARGUMENT

For the reasons set forth below, Equality California, the GSA Network, and their members have significant interests at stake in this case that could be impaired by the outcome and must be protected. In addition, Equality California, the GSA Network, and their members have no other means to protect their interests, and no existing party adequately represents their

[10] In addition, SB 777's replacement of Section 51500's existing list of protected characteristics with an incorporation of the characteristics protected by Section 220 resulted in replacement of the terms "handicap" and "creed" with references to "disability" and "religion," respectively.

interests. Accordingly, Equality California and the GSA Network should be permitted to intervene under Federal Rule of Civil Procedure [hereinafter FRCP] Rule 24(a).

In the alternative, Equality California and the GSA Network also meet the requirements for permissive intervention under FRCP 24(b), and the factors considered by courts in determining whether to permit permissive intervention militate strongly in favor of granting intervention in this case.

The Plaintiffs in this case seek to invalidate core statutory protections for lesbian, gay, bisexual, and transgender people in the State of California – including protections that have been in place for years and that play an essential role in ensuring that public education in California is available to all youth on equal terms regardless of sexual orientation or gender identity. The Proposed Intervenors represent the interests of students, parents, and other LGBT persons who will be most directly affected by the outcome of this case and would bear the brunt of invalidation of any of the challenged measures.

A. Equality California And The GSA Network Are Entitled To Intervene As Of Right Under FRCP 24(a).

Intervention as of right is governed by FRCP 24(a), which provides in relevant part:

> On timely motion, the court must permit anyone to intervene who: . . . . (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

The Ninth Circuit applies a four-part test to evaluate claims for intervention under this rule:

> (1) the motion must be timely; (2) the applicant must claim a "significantly protectable" interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter, impair or impede its ability to protect that interest; and (4) the existing parties may not adequately represent the applicant's interest.

Forest Conservation Council v. United States Forest Service, 66 F.3d 1489, 1493 (9th Cir. 1995); *see also United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002).

In applying that test, courts must construe FRCP 24(a) "broadly in favor of potential intervenors," and in light of the "liberal policy in favor of intervention." *City of Los Angeles*, 288 F.3d at 397. As the Ninth Circuit has explained:

> A liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts. By allowing parties with a *practical* interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues; at the same time, we allow an additional interested party to express its views before the court.

Forest Conservation Council, 66 F.3d at 1496 n.8 (emphasis in the original) (internal citations and quotation marks omitted).

As shown below, Equality California and the GSA Network satisfy the four-part test for intervention under Rule 24(a).

1. Equality California and the GSA Network's motion is timely.

In determining timeliness, courts weigh three factors: (1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of any delay. *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004). In this case, Equality California and the GSA Network's motion to intervene is being filed at the very outset of the case. Equality California and the GSA Network's intervention will not delay the litigation.

2. Equality California and the GSA Network have significant interests in the subject matter of the action.

Rule 24(a)'s requirement of an "interest relating to the property or transaction" is construed expansively. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*,386 U.S. 129, 132-36 (1967). The requirement "is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *City of Los Angeles,* 288 F.3d at 398 (internal quotation marks and citation omitted). Thus, "[a]n applicant has a 'significant protectable interest' in an action if (1) it asserts an interest that is protected under some law, and (2) there is a 'relationship' between its legally protected interest and the plaintiff's claims." *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006) (quoting *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir.

1998)). "The relationship requirement is met 'if the resolution of the plaintiff's claims actually will affect the applicant.'" *City of Los Angeles*, 288 F.3d 391, 398 (quoting *Donnelly v. Glickman*, 159 F.3d 405, 410 (9th Cir. 1998)).

It is also well settled under federal law that a public interest group that has sponsored or actively supported legislation "is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported." *Idaho Farm Bureau Fed'n v. Babbitt,* 58 F.3d 1392 (9th Cir. 1995), 1397 (conservation groups had interest in litigation challenging the listing of a snail under the Endangered Species Act, where they were active in getting the snail listed); *see also Idaho v. Freeman,* 625 F.2d 886 (9th Cir. 1980) (the National Organization for Women had the right to intervene in a suit challenging procedures for ratification of the proposed Equal Rights Amendment because it had actively championed the proposed amendment); *Sagebrush Rebellion, Inc. v. Watt,* 713 F.2d 525, 526-27 (9th Cir. 1983) (the Audubon Society and other environmental groups were entitled to intervene under Rule 24(a) to defend the validity of state action designating 500,000 acres of land as a protected conservation area); *Washington State Bldg. & Constr. Trades Council v. Spellman,* 684 F.2d 627, 630 (9th Cir. 1982) (a public interest group that sponsored a Washington statute prohibiting the introduction of radioactive waste from other states was entitled to intervention as a matter of right under Rule 24(a) in an action challenging the validity of that statute), *cert. denied, Don't Waste Washington Legal Defense Found. v. Washington,* 461 U.S. 913 (1983).

In this case, Equality California and the GSA Network have two sets of protectable interests, each of which is independently sufficient under the second prong of the four-part test. First, Equality California and the GSA Network have protectable interests in defending the validity of the challenged statutes because Equality California was an official sponsor of SB 777 and the lead organization lobbying for passage of the bill, and the GSA Network also actively worked to support the bill. For example, Equality California worked with Senator Kuehl to author the bill, participated in drafting bill language, testified at legislative hearings, and provided assistance to legislative staff regarding technical questions related to the bill. (Kors Decl. ¶ 5.) Equality California also met with legislators and the Governors office, sent emails to their members urging them to contact legislators and the governor, issued press releases and action alerts, secured co-authors among legislators, and held district meetings with legislators and their staff. (Kors Decl. ¶¶ 2, 4 & 5.) Student members of the GSA Network worked with the GSA Network to educate state Senators and Assembly Members about the students' personal experiences of harassment and discrimination based on sexual orientation and gender identity at school and to lobby for passage of SB 777. (Laub. Decl. ¶ 8.) The GSA Network produced educational materials about SB 777, arranged for a GSA student member to testify in front of the Senate Judiciary Committee, spearheaded a postcards to the Governor campaign for GSA clubs, and organized a statewide campaign urging GSA members to call the Governor's office in support of SB 777. *Id.*

Equality California was also an official co-sponsor of the measure that became AB 537, the California Student Safety and Violence Prevention Act of 2000, which banned discrimination in public schools on the bases of actual and perceived sexual orientation and gender (including gender identity) as defined in Penal Code 422.56. (Kors Decl. 6 .) Equality California was also an official sponsor of Senate Bill 1234 in 2004, which revised the definition of "gender" in Penal Code 422.56. (Kors Decl. 7.)

Second, Equality California and the GSA Network also have protectable interests in this litigation because many of their members are the primary intended beneficiaries of the challenged portions of SB 777 and the challenged portions of the hate crime statute. *See, e.g., California ex rel. Lockyer*, 450 F.3d at 441 (group seeking intervention to defend a challenged statute had a protected interest where they were "the intended beneficiaries of [the] law"). The inclusion of sexual orientation and gender identity in SB 777 is designed to promote equality in educational opportunities and to safeguard students and others, including many members of Equality California and the GSA Network, against discrimination based on sexual orientation and gender identity in public schools. Similarly, the inclusion of sexual orientation and gender in the hate crime statute is designed to deter and punish hate violence against persons who are, or who are perceived to be, lesbian, gay, bisexual, or transgender. Plaintiffs have brought suit against Defendant officials of the State of California specifically to prevent the enforcement of these protections. Accordingly, Equality California and the GSA Network's interest in this action is "protected under some law," *i.e.*, under the challenged provisions of SB 777 and the hate crime statute.

In addition, there plainly is a relationship between Proposed Intervenors' legally protected interests and the claims at issue in this lawsuit because the Plaintiffs are seeking declaratory and injunctive relief to invalidate the very statutes that protect the interests of Equality California's and the GSA Network's members. *See City of Los Angeles*, 288 F.3d at 398 ("The relationship requirement is met if the resolution of the plaintiff's claims actually will affect the applicant.") (internal quotation marks and citation omitted); *Forest Conservation Council*, 66 F.3d at 1494 (the requisite "relationship" between the "legally protected interest" and the action exists when "the injunctive relief sought by plaintiffs will have direct, immediate, and harmful effects" upon the applicants' interest). The Ninth Circuit has found a significant protectable interest in prior similar cases where groups sought to align themselves with government entities defending the validity of state action that protected the interests of those groups. *See, e.g., Sagebrush,* 713 F.2d 525 (finding national wildlife organization had a significant protectable interest in a suit brought by a nonprofit organization against the Department of the Interior challenging the creation of a wildlife habitat area); *Idaho Farm Bureau Fed'n*, 58 F.3d 1392 (finding a significant protected interest of conservation group in case brought against Fish and Wildlife Service challenging rule listing snail as endangered species).

3. Disposition of this action will significantly impair or impede the interests of Equality California and the GSA Network.

The third part of the Rule 24(a) inquiry is whether "the disposition of the action may as a practical matter, impair or impede [the applicant's] ability to protect [its] interest.'" *Forest Conservation Council*, 66 F.3d at 1493. This analysis "is not limited to consequences of a strictly legal nature." *Id.* at 1498 (quoting *Natural Resources Defense Council, Inc. v. U.S. Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1345 (10th Cir. 1978). Rather, "[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." *California ex rel. Lockyer*, 450 F.3d at 442 (quoting FRCP advisory committee note to 1966 amendment to Rule 24(a)).[11]

The outcome of this lawsuit unquestionably could impair the interests of Equality California and the GSA Network in preserving the challenged statutes and the substantive protections those statutes provide to the organizations' members. Were the Plaintiffs in this case to prevail in obtaining declarations that the challenged statutes are invalid and an injunction preventing the statutes' enforcement, such a result would significantly impede Proposed Intervenors' goals of keeping children safe and free from discrimination at school and of eradicating discrimination, harassment, and hate violence based on sexual orientation and gender identity. In addition, the members of Equality California and the GSA Network would be directly injured because they would be deprived of the protections against harassment, discrimination and violence that SB 777 and the hate crime statute provide. The Ninth Circuit has found impairment of interests in similar situations. *See, e.g.*, *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392 (9th Cir. 1985).

Intervention is also warranted under this third prong of the four-part test because if, the challenged statutes were struck down, or their sweep substantially narrowed, the Proposed Intervenors would have no other forum other than this litigation in which they might contest that interpretation of the challenged laws.

Similarly, in *California ex rel. Lockyer v. United States*, 450 F.3d 436, 443 (9th Cir. 2006) the Ninth Circuit granted intervention to health care providers who sought to defend the validity of the Weldon Amendment, a federal statute that prevents federal, state, and local governments from receiving certain federal funds if they restricted the ability of health care providers to refuse to provide, pay for, provide coverage of, or refer for abortions. *State ex rel. Lockyer*, 450 F.3d at 439. The Court explained: "If, as a result of this litigation, the

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[11] The "practical impairment" standard of Rule 24(a) resulted from a 1966 amendment "designed to liberalize the right to intervene in federal actions." *Nuesse v. Camp,* 385 F.2d 694, 701 (D.C. Cir. 1967).

Weldon Amendment is struck down, or its sweep is substantially narrowed, the Proposed Intervenors will have no alternative forum in which they might contest that interpretation of the Amendment." *California ex rel. Lockyer*, 450 F.3d at 443. The same analysis applies here.[12]

4. The interests of Equality California and the GSA Network may not be adequately represented by the parties to the action.

In determining whether an applicant's interest is adequately represented by the parties, courts must consider: (1) whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the would-be intervenor would offer any necessary elements to the proceedings that other parties would neglect. *California v. Tahoe Regional Planning Agency,* 792 F.2d 775, 778 (9th Cir. 1986).[13] The prospective intervenor has the burden of demonstrating that existing parties do not adequately represent its interests. *Sagebrush,* 713 F.2d at 528. "However, [the Ninth Circuit] follow[s] *Trbovich v. United Mine Workers,* 404 U.S. 528, 538 n. 10, 92 S. Ct. 630, 30 L. Ed. 2d 686 (1972), in holding that the requirement of inadequate representation is satisfied if the applicant shows that representation '*may be*' inadequate." *Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996) (emphasis added); *see also Forest Conservation Council*, 66 F.3d at 1498 ("[I]t is sufficient to show that representation *may* be inadequate.") (emphasis in original). Moreover,

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[12] In addition, in *United States* v. *City of Los Angeles*, 288 F.3d 391 (9th Cir. 2002), the Ninth Circuit granted intervention as of right to the bargaining unit for police officers in a case "because the proposed consent decree in the case purported to give the district court authority to override the officers' collective bargaining agreement." *California ex rel. Lockyer,* 450 F.3d at 443 (9th Cir. 2006) (describing *City of Los Angeles*, 288 F.3d at 401.) In granting intervention, the Court "noted that once the consent decree was entered, the officers would have no alternative forum to protect their rights." *California ex rel. Lockyer*, 450 F.3d at 443 (describing *City of Los Angeles*, 288 F.3d at 401).

[13] Whether representation may be inadequate has nothing to do with the quality of the existing defendants' attorneys: "Rule 24 requires that we look to the adequacy or inadequacy of representation by 'existing parties' not counsel." *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 529 (9th Cir. 1983).

"the burden of making that showing should be treated as minimal." *Trbovich*, 404 U.S. at 538, n.10.

Although where, as here, the government and proposed intervenors are on the same side in defending a statute a presumption of adequacy of representation arises, *see Forest Conservation Council*, 66 F.3d at 1499, proposed intervenors can rebut that presumption simply by demonstrating a "likelihood that the government will abandon or concede a potentially meritorious reading of the statute." *California ex. Rel. Lockyer v. United States*, 450 F.3d 436, 444 (9th Cir. 2006). To show that such a "likelihood" exists, a proposed intervenor need not show that the State definitely or probably will concede or fail to make an argument, but only that there is more than a "theoretical possibility" that it will do so. *Id.*

Here, Plaintiffs represent the purported interests of certain school board members, teachers, school counselors, parents and students who seek to enjoin the State's enforcement of the sexual orientation and gender identity provisions of SB 777 and the hate crime statute. The interests of the Plaintiffs, are, of course, contrary to those of many of Proposed Intervenors' members – including LGBT students and their parents, teachers, school administrators and others who benefit from and support legal protections for LGBT persons and who want the challenged statutes to go into effect and to be enforced.

The interests of the existing defendants – Governor Schwarzenegger, Attorney General Brown, and State Superintendent of Public Instruction O'Connell in their official capacities (collectively referred to hereinafter as "the State" or "Defendants") – also diverge or may diverge from those of the Proposed Intervenors in an important respect. The challenged statutes impose potential liability on teachers, administrators, school boards, and other school officials. In California, it is well settled that school districts are arms of the state. *Kirchmann v. Lake Elsinore Unified School Dist.*, 83 Cal.App.4th 1098, 1102-1112 (2000). Although judgments against school districts are not paid directly by the State Controller, "[b]ecause school district funds are considered funds of the state, payment of a judgment from such funds [has] 'essentially the same practical consequences as a judgment against the State itself.'"

Kirchmann, 83 Cal.App.4th at 1112 (internal citations omitted).[14] Accordingly, the State has an interest in minimizing the liability of public school districts in order to protect the public fisc.

Thus, while the State shares Proposed Intervenors' interest in eradicating discrimination based on sexual orientation and gender identity, the State also has a *competing* interest in protecting school officials from liability in order to protect the public fisc. Because of this competing institutional interest, there is no assurance that the State "will undoubtedly make all [of] the proposed intervenor's arguments." *Tahoe Regional Planning Agency,* 792 F.2d at 778. To the contrary, in order to discourage litigation and to limit the liability of school officials, it is possible that the State may adopt a more narrow view of what the challenged non-discrimination statutes require than that advanced by the Proposed Intervenors. As the Ninth Circuit has recognized, "willingness to suggest a limiting construction in defense of a statute is an important consideration in determining whether the government will adequately represent its constituents' interests." *California ex rel. Lockyer*, 450 F.3d at 444 (citing *Prete* v. *Bradbury*, 438 F.3d 949, 958 (9th Cir. 2006)). This difference may be particularly significant in this case, where the Plaintiffs have argued that the statutes are unconstitutionally overbroad and vague and, thus, where the scope of the challenged statutes may be directly at issue.

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[14] The California Court of Appeal has described "the state's extensive responsibility for and involvement in the fiscal affairs of school districts" as follows:

> The California Constitution obligates the state Legislature to "provide for a system of common schools . . . ." (Cal. Const., art. IX, § 5.) . . . . [S]chool districts receive their funding primarily from the state. The Education Code provides that the state Controller during each fiscal year shall transfer from the general fund of the state to the state school fund a specified amount per pupil. (Ed. Code, § 14002.) The state Superintendent of Public Education is required to certify to the Controller the amounts estimated to be apportioned to each school during the ensuing fiscal year. (Ed. Code, § 41330.) As the California Supreme Court has recognized, "since the adoption in June 1978 of Proposition 13, limiting local taxation of real property (Cal. Const., art. XIII A), school districts have become more dependent on appropriations by the Legislature for a major part of their revenue." *Cumero v. Public Employment Relations Bd.* (1989) 49 Cal. 3d 575, 592 [262 Cal. Rptr. 46, 778 P.2d 174], fn. omitted.
>
> Further, although funds received by school districts are to be paid into the county treasury for the credit of the district Cal. Ed. Code, §§ 41001, 41002, numerous courts have stated that "'school moneys *belong to the state* and the apportionment of funds to a school district does not give the district a proprietary interest in the funds. . . .'" *Laidlaw Waste Systems, Inc. v. Bay Cities Services, Inc.* (1996) 43 Cal. App. 4th 630, 635 [50 Cal. Rptr. 2d 824], italics added; accord, *Hayes v. Commission on State Mandates* (1992) 11 Cal. App. 4th 1564, 1578, fn. 5 [15 Cal. Rptr. 2d 547]; *California Teachers Assn. v. Hayes* (1992) 5 Cal. App. 4th 1513, 1525 [7 Cal. Rptr. 2d 699].

Kirchmann, 83 Cal.App.4th at 1111.

Under settled law, the existence of adversity between the State and the Proposed Intervenors rebuts the presumption of adequate representation.[15] "When a party possesses interests adverse to those of a prospective intervenor, that party cannot adequately represent the intervenor's interests." *United States v. Stringfellow*, 783 F.2d 821, 828 (9th Cir. 1986), *vacated on other grounds*, 480 U.S. 370 (1987) (citing *Sanguine, Ltd. v. United States Dep't of Interior*, 736 F.2d 1416, 1419 (10th Cir. 1984) (an applicant may meet burden of showing inadequate representation by showing that the representative has an interest adverse to the applicant); *Stadin v. Union Electric Co.*, 309 F.2d 912, 919 (8th Cir. 1962) (same)).

B. In The Alternative, The Court Should, In Its Discretion, Permit Equality California And The GSA Network To Intervene Under FRCP 24(b).

In addition to satisfying the requirements for intervention as of right under FRCP 24(a), Proposed Intervenors meet the requirements for permissive intervention under FRCP 24(b).[16] Rule 24(b)(1)(B) provides for a court to allow a party to intervene when the party "has a claim or defense that shares with the main action a common question of law or fact." In exercising its discretion under Rule 24(b), the Court must also consider "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." FRCP 24(b)(3). The rule also requires that the application must be "timely." FRCP 24(b)(1).

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[15] To be clear, in identifying this divergence of interests, the Proposed Intervenors do not intend any criticism of the State Defendants. Rather, due to the nature of the challenged statutes and the circumstance that school districts are arms of the state, the State has dual and, at least to some extent, competing interests in this case. In contrast, the sole interest of the Proposed Intervenors lies in ensuring that students, teachers, and other public school staff are free from discrimination, harassment and violence based on sexual orientation and gender identity. As the Ninth Circuit explained in *City of Los Angeles*, the presumption of adequate representation "arises when the government is acting on behalf of a constituency that it represents"; however, "[t]he situation is different when the government acts as an employer" or – as in this case – has another competing institutional interest adverse to that of the proposed intervenor. 288 F.3d at 401-402.

[16] Even if the Court grants intervention as of right, Equality California and the GSA Network respectfully request that the Court also rule on their alternative motion for permissive intervention to preserve the issue for appeal.

If these threshold requirements are met, deciding whether to grant permissive intervention "is directed to the sound discretion of the district court." *San Jose Mercury News, Inc. v. U. S. Dist. Court*, 187 F.3d 1096, 1100 (9th Cir. 1999). In exercising that discretion, a court should consider whether the applicant's participation would "contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented." *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir.1977); *see also* 6 Moore's Federal Practice § 24.10 [2][b] (Matthew Bender, 3d. ed.)

Rule 24(b)'s requirement of a common interest of law or fact is met in this case. The common question of law that Equality California and the GSA Network seek to address is whether the challenged statutory provisions are valid (i.e., whether the definitions of gender in the challenged provisions violate the Due Process Clause of the Federal Constitution because they are impermissibly vague, delegate policy matters to police, judges, and juries, or impinge the right to free expression, and whether the challenged statutes violate Article 1, Section 1 of the California Constitution).

Intervention by Equality California and the GSA Network will not delay or prejudice the adjudication of either Plaintiffs' or Defendants' rights, as Equality California and the GSA Network will not assert any new claims in this action. They merely seek to defend against Plaintiffs' existing claims. *See LG Electronics Inc. v. Q-Lity Computer Inc.*, 211 F.R.D. 360, 366 (N.D.Cal. 2002) ("[I]ntervention would not delay or prejudice the adjudication of the rights of the original parties, because these issues [that the proposed intervenor seeks to raise] have already been raised by the other parties. . . . the Court must consider these issues regardless of whether [the proposed intervenor] intervenes.") Moreover, both of the "applicants in intervention share the same common interest insofar as the subject matter of this litigation is concerned; they joined in a single application and are represented by the same attorney[s]" and speak with "one voice." *Sagebrush*, 713 F.2d at 526.

In addition, the motion is timely, as Equality California and the GSA Network are moving to intervene at the outset of the litigation. Thus, their intervention will not cause any delay.

In addition to the fact that Equality California and the GSA Network satisfy the threshold requirements for permissive intervention under Rule 24(b), discretion strongly favors allowing Equality California and the GSA Network to intervene because these organizations will significantly "contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented." *Spangler*, 552 F.2d at 1329. Equality California and the GSA Network are intimately familiar with the nature, scope, and impact of discrimination against LGBT people in school settings, with how existing law has been applied, and with the development of non-discrimination laws and hate crime laws in California and across the country. (Kors Decl. 13; Laub Decl. 16 .) Equality California and the GSA Network's expertise, as well as the personal experiences of their members, will aid in the full development of the record with respect to how the sexual orientation and gender identity provisions of the hate crime statute and non-discrimination statues have been implemented and enforced in the past, in school settings as well as in other arenas, such as in employment, housing, and public accommodations. Such expertise will aid in the just and equitable adjudication of Plaintiffs' legal claims in this action. [17]

Further, Equality California and the GSA Network offer a necessary perspective that the present parties are currently missing: the perspective of those students, parents, teachers, and others who would bear the brunt of invalidation of the challenged provisions of SB 777 and of the challenged provisions of the hate crime statute. Although the State Defendants

[17] Given the participation of the National Center for Lesbian Rights, Lambda Legal Defense and Education Fund, Inc., and the Transgender Law Center as co-counsel for the Proposed Intervenors, the joint submissions of Equality California and GSA Network in this action will be informed by leading legal organizations' expertise in California and Federal laws regarding discrimination based on sexual orientation and gender (including gender identity).

have responsibility for enforcing and/or defending state laws including SB 777, and have an interest in school safety in general, SB 777 and related nondiscrimination statutes that protect the same classifications that exist in the hate crime statute were specifically designed to protect students, such as many of the members of Equality California and GSA Network, from discrimination, and to improve their ability to learn. Since the passage of AB 537 in 2000, Equality California and GSA Network members have been legally protected from discrimination in schools based on their sexual orientation and gender identity. It is critical for the Court to hear the voices of students who support these protections and who would be subject to discrimination if protections against discrimination based on sexual orientation and gender were held unconstitutional, as well as the voices of parents whose children would be subjected to such discrimination. In addition, the adult members of the GSA Network are in a unique position to share with the Court their perspective as teachers, administrators, and counselors who have the responsibility to implement and enforce laws in public schools and have been applying and enforcing AB 537 and California's definition of gender in Section 422.56 of the Penal Code since 2001. *See, e.g., Sagebrush*, 713 F.2d at 528 ("In addition to having expertise apart from that of the Secretary, the intervenor offers a perspective which differs materially from that of the present parties to this litigation."). As in *Sagebrush*, the Equality California and GSA Network membership can offer a unique perspective that "differs materially from that of the present parties to this litigation." *Id.* at 528.

Both Equality California and the GSA Network have participated in other lawsuits that either challenged or sought to uphold California laws that directly impact LGBT people. (Kors Decl. 19 ;Laub Decl. 19.) Equality California was granted leave to intervene in three of the six consolidated lawsuits challenging California's statutory ban on marriage between same sex couples, *Tyler v. State of California*, California Appellate Court Case No. A110450, *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco*, California Appellate Court Case No. A110651, and *Campaign for California Families v. Newsom*, California Appellate Court Case No. A110652, which have now been consolidated as *In Re Marriage Cases*, California Supreme Court Case No. S147999. (Kors Decl. ¶ 19.) In addition, Equality California is a party *Woo v. Lockyer*, Appellate Court Case No. A110451, which is another one of the consolidated cases that constitute *In Re Marriage Cases* before the California Supreme Court. (*Id.*) Equality California was also granted leave to intervene in *Knight v. Schwarzenegger* and *Campaign for California Families v. Schwarzenegger,* Sacramento Superior Court Case Nos. AS05284 and AS07035, in which State Senator Pete Knight and others unsuccessfully challenged the validity of California's domestic partnership statute. *See Knight v. Superior Court,* 128 Cal.App.4th 14, 26 Cal.Rptr.3d 687 (Cal.App. 3rd Dist., 2005). (*Id.*) Equality California likewise was granted leave to intervene in *Strong v. State Board of* Equalization, Court of Appeals Case No. C052818, in which Equality California sought to uphold legislation that protected a surviving domestic partner from property tax reassessment when his or her partner dies. (*Id.*)

GSA Network was a plaintiff in *Ngoun v. Wolf*, U.S. District Court for the Central District of California Case No. SACV-05-868, and *Paramo v. Kern Union High School District*, Kern County Superior Court Case No. S-1500-CV-255519, both of which sought to enforce California's prohibition against discrimination on the basis of sexual orientation in schools under Education Code sections 200, 201, and 220 – three of the same statutes challenged in this lawsuit (albeit before their amendment by SB 777). (Laub Decl. 19.) GSA Network was also a plaintiff in *Ramirez v. Los Angeles Unified School District*, U.S. District Court Central District of California Case No. CV04-8923, and *Gay-Straight Alliance Network v. Visalia Unified School District*, U.S. District Eastern District of California Case. No. F-00-6616, both of which sought to enjoin harassment against gay and lesbian public school students. (Laub Decl. 19.)

The nature and extent of Equality California and the GSA Network's interests in the case also weigh heavily in favor of intervention, as the challenged provisions of the hate crime statute and SB 777 are meant to protect many members of Equality California and the GSA Network, and therefore it is their interest and their members' interests that are most at stake in this case. While the State also has an interest in defending its non-discrimination laws and hate crime laws, LGBT people are personally affected by these laws and have an interest in ensuring that the laws provide the fullest degree of protection.

Finally, judicial economy will be served by granting this motion for intervention. Equality California and the GSA Network represent LGBT Californians, and their members have the strongest interests in the outcome of this case. Accordingly, their intervention greatly minimizes the possibility of intervention by additional persons or groups whose rights might be affected by Plaintiffs' challenge to the sexual orientation and gender identity provisions of California's hate crimes statute and of SB 777.

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IV CONCLUSION

Equality California and the GSA Network and their members have direct interests in the statutory provisions challenged in this case and will be directly affected by the Court's ruling. For the reasons set forth above, Equality California and the GSA Network respectfully request that the Court grant their motion to intervene as party defendants, both as a matter of right and in the Court's discretion.

Date: December 21, 2007

Respectfully submitted,

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